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INCORPORATION BY IMPLICATION UNDER THE SHERMAN ACT. — The much interpreted Sherman Act [1] has lately appeared in the guise of an incorporating statute, for such is the effect of a recent decision of the Circuit Court of Appeals for the Eighth Circuit holding an unincorporated labor union a suable entity under it.[2] The statute after prohibiting the commission of certain enumerated acts by any "person" or "persons" declares: "That the word 'person' or 'persons' wherever used in the Act shall be deemed to include corporations and associations existing

[1] An Act to Protect Trade and Commerce Against Unlawful Restraints, 26 STAT. AT L. 209, 7 FED. STAT. ANNOT. 336.

[2] Dowd *v.* United Mine Workers of America, 235 Fed. 1. *Cf.* U. S. *v.* Coal Dealers' Ass'n., 85 Fed. 252, 260, where appear intimations to the contrary. In U. S. *v.* Joint Traffic Ass'n., 171 U. S. 505, U. S. *v.* Trans-Missouri Freight Ass'n. 166 U. S. 290, and Eastern States Retail Lumber Dealers' Ass'n. *v.* U. S., 234 U. S. 600, the point was not raised.

The principal case was begun before the passage of the Amendment of Oct. 15, 1914 (Clayton Act), 38 STAT. AT L. 730, 1916 SUPPL. FED. STAT. ANNOT. 267, and this latter statute was apparently not considered to have any bearing on the case. But if, as has been generally supposed, the Clayton Act exempts labor unions from the Anti-Trust Laws, *quære* whether it might not bar the action in the principal case. On the effect of repeal of a penal statute upon pending prosecutions, see WHARTON, CRIMINAL LAW, 11 ed., 513. The exact effect of the Clayton Act on labor unions, however, is a matter much in doubt. The important sections are 1, 6, 20, and 22. See "Labor is not a Commodity," THE NEW REPUBLIC for Dec. 2, 1916, p. 112, and a reply in the issue for Dec. 9, 1916, p. 152.

under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any state, or the laws of any foreign country." The precise meaning of this clause is somewhat conjectural. Does it extend to so-called voluntary associations,[3] which obviously are associations existing under or authorized by the laws of any state, etc., or was the legislative intent to confine it to those organizations which have been actually incorporated under a statute? The fact that organizations which are in reality corporations have been designated "associations"[4] by certain sovereigns lends color to the latter suggestion. The principal case, however, takes the broader view, which is certainly not capricious in the light of the language used.[5]

Assuming, then, that a voluntary association is included in the statute's prohibition, it follows by necessary implication that a remedy was intended against it as an entity, and not merely an action against the individual members; for they are suable without special words, and the inclusion of voluntary associations in the statute would on such a construction be rendered meaningless. The conclusion seems inevitable that for the purposes of the Sherman Act a labor union or any other species of voluntary association may be treated as a legal unit apart from its members — sued as such, judgment rendered against it, and its property [6] now or hereafter owned taken on execution.

The law recognizes but two kinds of units, *viz.*, human beings and corporations. Hence a corporation may comprehensively be defined as a legal unit not a human being. If this definition be correct, then it follows from the foregoing analysis that the Sherman Act has incorporated all voluntary associations for the purposes of prosecutions thereunder — manifestly a decided change in the status of voluntary associations, for the proposition that a voluntary association, having no legal existence apart from its members, cannot be sued is firmly imbedded in the common law.[7]

A corporation possessing these volatile, fly-by-night attributes might seem an alarming creature, and yet it stands apparently unassailable. The conception of a corporation for a single purpose is of very ancient origin.[8] Nor is the indirectness and informality of the incorporating

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[3] For a criticism of this terminology, see WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS, 1.

[4] See Andrews Bros. Co. *v.* Youngstown Coke Co., 58 U. S. Ap. 444.

[5] For a similar interpretation of similar words, see opinion of Bradley, J., in Liverpool Ins. Co. *v.* Mass., 10 Wall. (U. S.) 566, 576.

[6] It is to be noticed that the legal title to property normally referred to as property of the association is not vested in the association as an entity but in all the members as co-owners, or more commonly in a few trustees in trust for members for associate purposes. See WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS, 239; also 25 HARV. L. REV. 582. The effect of the Sherman Act is, it is submitted, to vest the title to the associate property in the new entity, which it has created, for the purposes of executions pursuant to proceedings under the Sherman Act. (For if the judgment runs against the association as an entity, there would be no warrant for taking property belonging to the members.)

[7] St. Paul Typothetæ *v.* St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725. Other cases collected in 2 L. R. A. (N. S.) 789 and 1 B. R. C. 852.

[8] See KYD, CORPORATIONS, 29, where reference is made to the church wardens, who were clothed with corporate capacity for receiving and holding chattels (but not realty or *choses* in action) to the use of the parishioners.

process here unsupported by precedent.[9] Nor can it now be doubted that the Federal Constitution enables Congress to create corporations where reasonably necessary to the proper exercise of its other powers.[10] The requisite consent on the part of the members to incorporation is furnished by their continuance in the association.[11]

Voluntary associations are to-day an enormous factor in commercial enterprise, while in general the law is still clinging to clumsy, antiquated methods of laying hold of them. Equity, it is true, has appreciated the difficulty of corralling all the members of a large association even with the aid of statutes permitting substituted and constructive service of process, and has accordingly invented the device of a so-called representative suit,[12] in which a few members only are made parties and a decree rendered binding all; but this practice has never been taken over by the law courts. The result achieved in the principal case seems to the writer not only unobjectionable in point of principle, but a particularly timely contribution to the law.

CIVIL CONSCRIPTION IN THE UNITED STATES. — That the state may, in case of necessity, compel its citizens to do military service, is consonant with our ideas both of common and of constitutional law. That the satisfaction of any civil need of the state may likewise be compelled, however, is a conception new to us, and one that will be regarded by most lawyers with instinctive hostility. But this compulsion, which, in lieu of a better term, may be called civil conscription, is, it is submitted, settled in practice and sound in principle. The service, both military and civil,[1] which the feudal system exacted, had a larger warrant than any theory of land tenure could give,[2] in the inherent right of the state to safety and to preservation.[3] The real basis of the conscription is the

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[9] Buckland *v.* Fowcher, 2 H. 7, 13 *a*, *b*, where R.'s mere license from the king to grant rent in succession to a chaplain was held to confer a corporate capacity on the chaplain and his successors. This case is cited and discussed in 10 Co. 27 *a* and KYD, CORPORATIONS, 52, 62. See also Taff Vale Ry. Co. *v.* Amalgamated Society of Railway Servants, [1901] A. C. 426; discussed in 15 HARV. L. REV. 310.

[10] See MORAWETZ, CORPORATIONS, 11.

[11] Assent to incorporation need not be express but may be inferred from acts. See MORAWETZ, CORPORATIONS, 23.

[12] For a more detailed analysis, see STORY, EQUITY PLEADING, § 94 *et seq.*; cases collected in 1 B. R. C. 854.

[1] For the heavy civil duties attached to villein tenure, see POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 370, 372.

[2] Military service was exacted even of those who held no land. MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND, 162.

[3] This right has been consistently recognized both in England and in the United States. See Rex *v.* Larwood, 1 Salk. 167, 168: "The King hath an interest in every subject, and a right to his services." *Cf.* Lanahan *v.* Birge, 30 Conn. 438, 443: "It is a fundamental principle of national law, essential to national life, that every citizen . . . is under obligation to serve and defend the constituted authorities of the state and nation . . . when such service is lawfully required."

In 1642 Parliament and King Charles disputed concerning the King's right to conscript without Parliament's consent. See A DECLARATION OF THE LORDS AND COMMONS ASSEMBLED IN PARLIAMENT UPON THE STATUTE OF 5 H. 4, WHEREBY THE COMMISSION OF ARRAY IS SUPPOSED TO BE WARRANTED: TOGETHER WITH DIVERS OTHER STATUTES . . . AS ALSO HIS MAJESTIES LETTER TO THE SHERIF OF LEICESTERSHIRE